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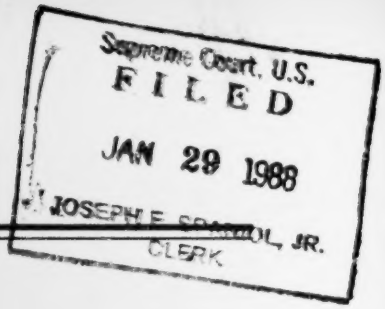

No. 87-830

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TOM MCGREGOR, TRUSTEE, ETC.,
Petitioner,

vs.

FIRST ALABAMA BANK AND EDWARD HERBERT
Respondents.

On Petition for a Writ of Certiorari to The
United States Court of Appeals For the Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The district court below decided against certain plaintiffs who had sought relief under the antitying provisions of the Bank Holding Company Act ("BHCA"), 12 U.S.C. §§ 1972-1975. Later, on June 15, 1983, that court found that these plaintiffs—and petitioner in privity with them, who knowingly elected to stay out of this federal proceeding—sought to relitigate substantially identical matters in an Alabama state court action. The district court then—acting under 28 U.S.C. § 2283 to protect and effectuate its earlier judgment—enjoined further prosecution of the state court action. The Court of Appeals affirmed. This Court reversed and remanded so that the district court could consider the *possible* preclusive effect, under Alabama law, of any state court judgment; and general principles of equity, comity and federalism.

1. Did the courts below correctly determine that no state court judgment was entitled to preclusive effect under Alabama law; and that this injunction should stand unrevised under general principles of equity, comity and federalism?

2. Did the court below correctly affirm the district court's inclusion of petitioner in its injunction upon a factual finding of privity and adequate representation?

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BRIEF OF RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 825 F.2d 1475 (11th Cir. 1987). It appears as Appendix A to the petition. The opinion of the United States District Court for the Middle District of Alabama ("District Court") of July 17, 1986 appears as Appendix B to the petition; its opinions and orders of June 15, 1983 and March 29, 1985 appear as Appendices B and C to this brief.

STATEMENT OF THE CASE

Preface

This case clearly does not warrant review by this Court as shown by the exhaustive opinion of the court of appeals below; and by the unreported decision of the district court on remand (A-23 through A-58).

This Court has already rendered a decision in this litigation, *Parsons Steel, Inc. v. First Alabama Bank,* 474 U.S. 518, 88 L.Ed.2d, 877 (1986). Relevant facts and the history of this litigation are fully stated there and in the opinions below, following remand. This Court reversed and remanded because the court of appeals below, in 747 F.2d 1367, refused "to consider the *possible* preclusive effect, under Alabama law, of the state court judgment." (88 L.Ed.2d at 883). (Emphasis supplied.[1] On remand, as held by the court below (825 F.2d at 1480; A-6):

> "[T]he district court found that Alabama law did not give preclusive effect to the state court's determination of the res judicata issue because there was no final judgment in that action and that an injunction was proper under principles of equity, comity and federalism. It therefore ordered that its injunction continue in force."

---

[1] 88 L.Ed.2d 884-885:

> "We hold, therefore, that the Court of Appeals erred by refusing to consider the *possible* preclusive effect, under Alabama law, of the state-court judgment. . . .
>
> We think the District Court is best situated to determine and apply Alabama preclusion law in the first instance. . . . Should the District Court conclude that the state-court judgment *is not entitled to preclusive effect* under Alabama law and the Full Faith and Credit Act, it would then be in the best position to decide the propriety of a federal-court injunction under the general principles of equity, comity and federalism discussed in *Mitchum v. Foster,* (Cit.)." (Emphasis supplied.)

The court of appeals below unanimously affirmed. Its meticulous opinion was authored by Circuit Judge Frank M. Johnson, who formerly, for at least 20 years, served as a judge of this same Alabama federal district. Moreover, Circuit Judge Hill, whose earlier dissent was noted in this Court's opinion (88 L.Ed.2d at 883), concurred in the unanimous affirmance and decision below.

Parsons Steel Industries, Inc. ("Parsons-Montgomery") and its parent corporation, Parsons Steel, Inc. ("Parsons-Mobile"), and the holders of 99% of its stock, Jim Parsons and Melba Parsons ("Parsons"), filed a complaint in state court against respondents generally concerned with Bank's foreclosure of its security interest in certain property of Parsons-Montgomery. Following the involuntary bankruptcy of Parsons-Montgomery,[2] Parsons-Mobile and Parsons filed a virtually identical complaint against Bank in federal court.[3] As the court of appeals held:

> "Viewing the federal and state actions based on the Bank's presale activities as frivolous, the Trustee declined to participate in either action. In the state court action, however, he was involuntarily joined as a party-plaintiff . . . The Trustee was aware of the federal court proceeding and was free to intervene on the bankrupt corporation's behalf. Instead, he declined to get involved because he felt the suit . . . would be a waste of money for the unsecured creditors he represents."[4]

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[2] Its successor trustee is the only petitioner here.

[3] A side-by-side comparison of the complaints appears in Appendix A of this brief.

[4] 747 F.2d at 1378-79.

BEST AVAILA

A federal judgment for Bank was affirmed, 679 F.2d 242 (11th Cir. 1982) ("*Parsons I*"). Bank pleaded the federal judgment as res judicata in state action. Motions for summary judgment raising this defense were denied. And, prior to trial on the merits, the state trial court held that the res judicata issue was a question of law to be decided by the court and not the jury. After jury verdict for plaintiffs and while post-trial motions raising again their res judicata defense were pending, respondents sought a federal injunction under 28 U.S.C. §2283 to protect and effectuate the prior federal judgment affirmed in *Parsons I.* The injunction issued, and was affirmed, 747 F.2d 1367 (11th Cir. 1984) ("*Parsons II*").

On remand,[5] the district court resolved these issues in respondents' favor (Pet., A-23), and the court below affirmed, 825 F.2d 1475 (11th Cir. 1987). (Pet., A-21) ("*Parsons IV*"). It held (825 F.2d at 1480-1481):

> "Under Alabama law, res judicata and collateral estoppel principles do not apply until there is a final judgment rendered on the merits of the case. (Citing Alabama cases).
>
> . . . [T]he district court was correct in its determination that Alabama equates finality for purposes of preclusion with appealability. . . .
>
> The judgment entered pursuant to the jury verdict in the state action in this case was not final for purposes of appeal during the pendency of the judgment n.o.v. and new trial motions."[6]

---

[5] This Court's holding is quoted n.1, *supra.*

[6] Petitioner does not even present for review the question of the correctness of this holding. Without citation of authority, petitioner makes a one-sentence contention that the holding is "erroneous." (p. 13.)

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The "best position[ed]" district court also held that principles of equity, comity and federalism required the injunction (A 49-58):

> "[T]o permit further litigation which the parties appear to concede should be barred as attempted relitigation — would mock equity and the entire judicial process." (A-53).

Although the district court found that the stricter *Younger*[7] test had been satisfied, the *Parsons IV* court below held that the *Younger* principle did not apply to this civil case[8] and affirmed because respondents had made a "strong and unequivocal showing of relitigation." (825 F.2d at 1484).

In *Parsons IV*, the court of appeals also reiterated its earlier affirmance of the district court finding that the trustee was in privity with the Parsons "based on the trustee's knowledge of the federal action, with regard to which he made a deliberate choice not to intervene; the identity of the facts underlying the BHCA claim and the trustee's claim; and the fact Parsons-Montgomery was the entity primarily wronged by the alleged activities of First Alabama and thus would have been the party entitled to most of the damages." (825 F.2d at 1486.)

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[7] *Younger v. Harris*, 401 U.S. 37.

[8] "Thus it is only civil proceedings 'in which important state interests are involved' that warrant abstention under the *Younger* doctrine. . . .

* * *

. . . The state court action involved in this case was merely a private action between private parties in which the State of Alabama had no interest beyond 'its interest as adjudicator of wholly private disputes.' . . ." 825 F.2d at 1483. (quoting *Moore v. Sims*, 442 U.S. at 423 and *Pennzoil Co. v. Texaco, Inc.*, 107 S.Ct. at 1527).

Petitioner's statement is erroneous and misleading in several respects. It states (p. 3) that the earlier federal action affirmed in *Parsons I* sought no damages on behalf of Parsons-Montgomery and alleged only that Bank had placed an impermissible condition on the further extension of credit in violation of the BHCA. These errors are negated by the extensive factual recitations of the courts below. Identical complaints were filed in state and federal actions, demanding the same damages to the penny. The district court held that "an identical set of facts to those previously tried in this court" was tried in the later state proceedings, and the court of appeals approved these findings.

Petitioner erroneously contends that the state judge "ruled that the federal judgment did not bar the state action;" but fails to mention that the district court, following remand by this Court, held:

> "The State Court decided, not that the prior federal judgment did not preclude on res judicata principles a State Court's determination of the issues, but that (on motions to dismiss and for summary judgment) the pleadings and evidence then before the Court were inconclusive." Pet. A 34-35.

In a remarkable error, petitioner asserts (p. 5) that the district court "made no finding that the injunction was necessary to 'protect or effectuate' its prior judgment" and instead "based the injunction solely on its conclusion that the Federal Action barred the State Action although clearly recognizing the two actions involved different causes of action." This statement is wholly inaccurate.[9]

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[9] 747 F.2d at 1370:

> "Because the state court judgment in effect nullified the federal court judgment in favor of the Bank, the federal court, pursuant to 28 U.S.C. §2283, enjoined further prosecution of the state court action in order to protect or effectuate its prior judgment."

Finally, it is significant that only the trustee of Parsons-Montgomery seeks review of the decision below; Parsons-Mobile and the individual Parsons do not. And none has ever questioned "the correctness of the holding . . . that the [federal] judgment bars the attempted relitigation in State Court." (A-52)

REASONS FOR DENYING THE WRIT

Petitioner has failed to present any "special or important reasons" for the grant of certiorari and has failed to invoke any of the criteria specified in Supreme Court Rule 17.1(a) and (c); there is no conflict with a decision of another federal court of appeals; there is no suggested departure "from the accepted and usual course of judicial proceedings;" and the decision below accords with the applicable decision of this Court in 474 U.S. 518, 88 L.Ed.2d 877.

1. This case should end now. The courts below on remand have followed the direction of this Court and have correctly determined that no state court judgment was entitled to preclusive effect under Alabama law. Petitioner has cited — and can cite — no contrary Alabama authority. This Court should not grant review to question these determinations of Alabama law.

2. The court of appeals below followed recent and numerous decisions of this Court,[10] which have consistently held that the *Younger* principle does not apply to civil litigation unless important state interests are involved; and correctly held that the state court action in this case was merely a private action between private parties in which the State of Alabama had no interest other than as an adjudicator of private disputes. (825 F.2d at 1483).

3. Equity, Comity and Federalism. The courts below have twice determined that the injunction in this case recognized and followed almost 40 years of consistent judicial interpretation of the purpose of Congress in 1948 when it enacted the relitigation

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[10] *Pennzoil v. Texaco,* ____ U.S. ____, 95 L.Ed.2d 1, 15-17 (1987); *Ohio Civil Rights Comm. v. Dayton Schools,* ____ U.S. ____, 91 L.Ed.2d 512, 521 (1986); *Middlesex County Ethics Comm. v. Garden State Bar Assn.,* 457 U.S. 423, 434; *Moore v. Sims,* 442 U.S. 415, 423; *Juidice v. Vail,* 430 U.S. 327, 335-36; *Trainor v. Hernandez,* 431 U.S. 434, 444; *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 611.

exception to 28 U.S.C.A. §2283. These courts applied that statute in a classic context — to effectuate the earlier judgment of the district court; to enjoin its attempted nullification by a later state court judgment; and thus to safeguard to the victor in the earlier federal litigation the fruits of that victory. This is precisely why Congress enacted this exception to §2283 in 1948 namely, to assure by express legislative language that federal courts have the power to enjoin proceedings in a state court "to protect or effectuate their judgments." As the code reviser has noted, Congress intended to adopt, by this legislation, the position of the "vigorous dissenting opinion" in *Toucey v. New York Life,* 314 U.S. 118, 144.[11]

Congress then agreed with Justice Reed that a federal court winner should not be forced to bring a plea of res judicata in a state court, "unfamiliar with the record already made," and if eventually unsuccessful seek review in this Court of an adverse state judgment. Congress and the federal judiciary, since 1948, have considered that process an inadequate remedy, and not required by any principles of comity or federalism which Congress then rejected when it overruled *Toucey.*

---

[11] So characterized by Congress which adopted it when it reversed the *Toucey* decision by the enactment of §2283. This decision was criticized by the "vigorous dissenting opinion" of Justice Reed (314 U.S. at 144):

> "This alternative is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of res judicata which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication. We, too, desire that the difficulties innate in the federal system of government may be smoothed away without a clash of sovereignties but we find no cause for alarm in affirming a court which forbids parties bound by its decree to fight the battle over on another day and field." (Footnotes omitted.)

This Court in this case expressly noted that it "fully accept[ed] the logic of Justice Reed's dissent. . . ." (88 L.Ed.2d at 884)

Moreover, the concerns of equity which underlie the district court's injunction are strikingly apparent. The courts below — twice after elaborate judicial treatment — have concluded that the state action was barred by the earlier federal judgment on principles of res judicata and collateral estoppel. Remarkably, the Parsons' interests and this petitioner did not even present for review in this Court the ultimate federal question[12] of the correctness of these decisions. Thereafter, and even after remand (in a state action against their attorneys), the Parsons admitted the bar of prior federal litigation. The Parsons do not now seek review here. Thus it is fair to say that the parties do not question the correctness of the repeated holdings below that the judgment in the federal action bars the attempted relitigation in state courts of matters which were or could have been litigated in the federal action.

To assert that the district court's finding of bad faith and harassment is not clearly erroneous — the test under Rule 52(a), FRCP — is to deal in understatement. This petitioner reached this Court with an opportunity to present the ultimate and pervasive substantive federal question[13] of whether the district court's prior federal judgment barred further litigation in the state courts. He and his Parsons cohorts deliberately chose not

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[12] Their brief (p. 28, n.20) expressly declined to present the federal question "of whether the courts below were correct in ultimately finding that the State Action was barred by the federal judgment under principles of res judicata and collateral estoppel. . . ."

[13] A state court's failure to give res judicata effect to a decree of a federal court raises a federal question reviewable by the Supreme Court on certiorari. Cf. *Crescent City Livestock v. Butchers Union etc. Co.*, 120 U.S. 141. See Note, *Federal Power to Enjoin State Court Proceedings*, 74 Harv. L.Rev. 726, 731, n. 57 (1961).

to do so. And he now argues that the only path available to Bank to secure the fruits of its earlier federal victory is to go back a third time to this Court — if this Court agrees to review the question — after a long, expensive and tortuous journey through state courts unfamiliar with the prior proceedings in either the state court or the district court. The burden of such a journey — as indeed the burden and concomitant damage of nine years of litigation — are clearly irreparable.[14]

Equity demands the continued effectiveness of the permanent federal injunction of June 15, 1983. It should remain in effect, and the slightest undermining of it—to permit further litigation which the parties concede should be barred as attempted relitigation—would mock justice and the entire judicial process. Insofar as comity may be concerned, that principle—and that of "our Federalism" which underlies it—contemplate "a system in which there is sensitivity to the legitimate interests of *both* State and National Governments...." (Emphasis supplied.)[15]

This Court, as the court below painstakingly demonstrated,[16] has repeatedly explained that the so-called *Younger* doctrine

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[14] A contrary demonstration of good faith was exemplified in *Sosna v. Iowa,* 419 U.S. 393, 396, n.3:

> "Our request that the parties address themselves to *Younger v. Harris,* (Cit.) and related cases, indicated our concern as to whether either this Court or the District Court should reach the merits of the constitutional issue presented by the parties in light of appellant Sosna's failure to appeal the adverse ruling of the [Iowa state trial court] through the state appellate network. In response to our request, both parties urged that we reach the merits of appellant's constitutional attack on Iowa's durational residency requirement."

[15] *Younger v. Harris,* 401 U.S. 37, 44, cited in *Mitchum v. Foster,* 407 U.S. 225, 243, cited in turn by this Court in the case at bar, 88 L.Ed.2d at 885.

[16] See discussion, *supra,* p. 8.

does not apply to all ongoing state civil proceedings. Chief Justice Rehnquist—the author of the decision at bar—wrote pointedly in *Moore v. Sims,* 442 U.S. 415, 423, n. 8, that "contrary to the suggestion of the dissent, we do not remotely suggest 'that every pending proceeding between a State and a federal plaintiff justifies abstention unless one of the exceptions to Younger applies.' "[17]

The best positioned courts below have twice held that Bank has made a strong and unequivocal showing of relitigation. It need show no more to preserve its federal injunction.

It is difficult to understand the trustee's argument regarding *A.C.L.R. Co. v. Brotherhood,* 398 U.S. 281. The court below—in an exhaustive analysis—rejected it. Surely trustee does not suggest that A.C.L. is dispositive and requires dissolution of this federal injunction. Obviously, this Court did not dispose of this case on that basis but remanded to the district court as the one best positioned to determine the issues which this Court held to be dispositive, namely, Alabama preclusivity and considerations of equity, comity and federalism.[18]

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[17] *A fortiori* the *Younger* doctrine does not apply to state civil proceedings in which the state itself is not a party and which involve only private litigants.

[18] Moreover, petitioner's analysis of *A.C.L.* is flawed. In that case Justice Black, for the majority, and dissenting Justices Brennan and White agreed that a federal district court could enjoin a later state judgment in order to "protect or effectuate" an earlier federal judgment. Although "[p]roceedings in state courts should *normally* be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court,..." the majority opinion recognized that § 2283 was an exception to this principle when federal intervention by a district court was necessary "to protect or effectuate" an earlier judgment of that federal court. (398 U.S. at 287; emphasis supplied.)

The courts below have again correctly determined that equity, comity and federalism require the continuation of the injunction in force.[19]

The majority in *ACL* held that the later federal injunction was precipitated by a supervening decision of this Court, and was not an effort by the federal district court to protect or effectuate an earlier judgment—a judgment which the majority found to have been based on the Norris-LaGuardia Act's withdrawal of "jurisdiction" of a federal court to issue an injunction in that labor dispute. 29 U.S.C. §101. Thus, there was no decision on the merits. The dissenters disagreed and were of the opinion that the district court had, indeed, acted to protect or effectuate its earlier judgment—a judgment which "obviously decided considerably more than the threshold question of whether the Norris-LaGuardia Act withdrew jurisdiction to grant federal injunctive relief in the circumstances of this case." (389 U.S. at 299)

[19] Petitioner erroneously argues that the relitigation exception in Sec. 2283 was not intended by Congress to allow the issuance of a federal court injunction where the later state court action involved claims which could have been, but were not actually litigated in the prior federal section.

This contention is at war with the facts of the Iowa Bridge case in *Toucey*. There, the federal injunction issued because the earlier federal judgment was "an absolute bar to the prosecution of the second action, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Phoenix Financial Corp. v. Iowa-Wis. Bridge Co.*, 115 F.2d 1, 6 (8th Cir. 1940).

This contention conflicts with Justice Reed's dissent in *Toucey*, which begins (314 U.S. at 141-142):

> "The controlling issue in both the *Toucey* and the *Phoenix Finance Corp.* cases is the power of a federal court to protect those who have obtained its decrees against an effort to force relitigation of the *same causes of action* in the state courts." (Emphasis supplied.)

4. The petition impermissibly seeks to present a due process argument never articulated in the courts below; the argument itself has no merit; and the petition simply seeks a review here of repeated factual findings.

The court below, as the district court, held that as to facts relating to BHCA and fraud claims, "the Trustee is in privity with the Parsons as to the adjudication of those facts and is bound by the federal adjudication of those matters."[20] See *Montana v. United States,* 440 U.S. 147. The court below also affirmed the district court's finding that trustee's UCC claim was based on the same alleged improprieties.[21] Indeed, a case cited by petitioner, *General Foods v. Mass. Dept. of Health,* 648 F.2d 784, 787 (1st Cir. 1981), enunciates the appropriate test that due process permits a nonparty to be bound by a judgment if "he had directly or vicariously a full and fair opportunity to present evidence and argument." Petitioner's other cases apply this test and also hold questions of privity and adequate representation to be fact issues. The court below for a second

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And the contention is squarely contrary to uniform holdings of most courts of appeals: the two holdings of the court below and those of this circuit on which it relied; *Harper Plastics v. Amoco Chemicals,* 657 F.2d 939, 945 (7th Cir. 1981); *Ennis v. Woodmar Realty Co.,* 542 F.2d 45, 49 (7th Cir. 1976); *Donelon v. New Orleans Term Co.,* 474 F.2d 1108, 1113 (5th Cir. 1973); *Brown v. McCormick,* 608 F.2d 410, 416 (10th Cir. 1979); *Silcox v. United Trucking Services,* 687 F.2d 848, 853 (6th Cir. 1982); *U.S. v. District of Columbia,* 654 F.2d 802, 810, n.19 (D.C. Cir. 1981); *Allied Mut. Ins. Co. v. Roberson,* 306 F.2d 130, 133 (4th Cir. 1962); *Wood v. Santa Barbara Chamber of Commerce,* 705 F.2d 1515, 1524 (9th Cir. 1983).

[20] 747 F.2d at 1380; reiterated in *Parsons IV,* 825 F.2d at 1486.

[21] 825 F.2d at 1487-88. When, upon court order the trustee stated his UCC claim with specificity, "the district court did not err in finding that all of these facts related to the pre-sale actions of [Bank]." *Ibid.*

time approved the district court's finding. (825 F.2d at 1486); quoted p.6, *supra*)[22]

Moreover, Trustee was in fact adequately represented in the federal action; was in privity with the other Parsons plaintiffs there; and is bound as they are by the results of the federal action as to matters which were raised and decided and as to matters which were not, but could have been. *Nevada v. United States,* 463 U.S. 110, 129-130.[23]

Surely, this Court will not now seek to review findings of fact—made twice by the trial and appellate courts below—that Parsons-Montgomery and its Trustee were adequately represented in the prior litigation. Its parent corporation, Parsons-Mobile, and the holders of 99% of the stock of the parent, were parties in federal action.[24] Trustee joined in the pleadings of the other plaintiffs, and throughout the state ac-

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[22] Its earlier affirmance had stated: (747 F.2d at 1379):

> " 'The trustee was well aware of these proceedings (the prior federal action) and made no effort to intervene as an interested party. *** Under these circumstances, the trustee cannot complain that he lacked a full and fair opportunity to litigate the issue in question at the federal district court proceeding. Collateral estoppel thus precludes the trustee from relitigating this issue.' *Four Corners, supra,* at 160."

[23] "Simply put, the doctrine of res judicata provides that when a final judgment has been entered on the merits of a case, [i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell v. County of Sac,* 94 US 351, 352...." *See, also, Southwest Airlines Co. v. Texas,* 546 F.2d 84, 94-95 (5th Cir. 1977):

> "[F]ederal courts have repeatedly held that judgments can bind persons not party to the litigation in question."

[24] See *Kraeger v. General Electric,* 497 F.2d 468 (2d Cir. 1974), *cert. denied* 419 U.S. 61, which held that the sole stockholder of a corporation was bound by the dismissal of an earlier action brought in the name of the corporation.

tion, took positions in that case consistent with the individual Parsons and Parsons-Mobile.

The complaints in both cases alleged identical wrongs and sought identical damages. Petitioner cannot contend that parent Parsons corporation, asking for $2,419,945.89 for diminution of the value of its stock in the bankrupt subsidiary, was entitled to one recovery of this sum for damages arising out of a commercially unreasonably sale of the assets of subsidiary; and that the trustee of the bankrupt subsidiary would be entitled to another identical recovery on behalf of the subsidiary. The court below has twice correctly held that the damages sought against Bank in federal action specifically involved alleged damages to the wholly owned subsidiary as a proximate result of the alleged dealings between Bank and its debtor, the subsidiary; and that the bankrupt subsidiary, and thus its trustee, was the primary, if not sole party damaged by the alleged violation of the Bank Holding Company Action.

Indeed, there are litmus tests that trustee and his state action lawyers considered representation by the Parsons and their lawyers to be completely adequate. The witness list submitted by trustee in state action[23] not only specified all persons who testified in federal action and in depositions taken in that action; but as to the very state action, trustee designated "any witness listed by co-plaintiffs [Parsons in state action]." In

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[23] Plaintiffs' Exhibit 4 of Joint Appendix, p.186 in former proceedings here ("JA").

argument to the jury, counsel for trustee adopted the arguments of attorneys for the Parsons.[26]

All of these facts compelled the repeated findings of the courts below that the Parsons — and their parent corporation — owners of all proprietary interest in a subsidiary said to have been injured by Bank — adequately represented the interests of the subsidiary in the federal action — "primary if not sole" interests alleged to have been damaged by the acts and omissions of Bank. Trustee "had directly or vicariously a full and fair opportunity to present evidence and argument."[27]

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[26] In his opening statement to the jury in state action, an argument comprising one transcribed page, counsel for trustee, "in the interest of time" adopted Parsons' counsel's "statement of what we expect the evidence to show." (JA 338) In his closing argument to the jury, counsel for trustee stated: "I come to you behind [counsel for Parsons] who has stated the evidence to you as I have seen it." (JA 339) The Parsons' jury argument in federal action paralleled trustee's jury argument in state action.

Federal argument:

> "[Mr. Orange] got the land, he got all of the assets, all of the coils . . . all of the equipment; everything out there. They shut out, effectively, the unsecured creditors. That is out, at this point. But they got a valuable piece of property, they got a good business; they get the Parsons' business. And they are going to tell you that Mr. Parsons benefitted from this arrangement. They are going to try to tell you that Mr. Parsons actually dreamed this scheme up." (JA 198)

Significantly, the lawyer for trustee argued in state action:

> "Let me talk to you just briefly about the commercial unreasonableness . . . first thing in January, January 5, you got them figuring out how to walk away with all the goodies and leave the unsecured creditors and Parsons-Montgomery out in the cold. . . .. There was only one bidder there. One person, one buyer. It was all prearranged. It was done in secret. It was done in a hidden fashion. . . . They handled it quietly. They say Jim Parsons waived notice, . . . They didn't want anybody else there. They were going to sell it to Michael Orange. They made that decision way back on the 10th or the 11th." (JA 330-331)

[27] *General Foods v. Mass. Dept. of Health, supra,* p. 14.

CONCLUSION

Accordingly, petitioner has failed to advance any reason for the grant of certiorari and, for the foregoing reasons, it is respectfully submitted that his petition should be denied.

Respectfully submitted,

M. ROLAND NACHMAN, JR.
P.O. Box 78
Montgomery, Alabama 36101

Counsel of Record for Respondents

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Brief of Respondents in Opposition upon counsel of record for Petitioner by depositing a copy in the United States mail, postage prepaid, addressed as follows:

James Jerry Wood, Esq.
641 South Lawrence Street
Montgomery, Alabama 36104

this 29th day of January, 1988.

M. Roland Nachman, Jr.

APPENDIX

APPENDIX A

COMPARISON OF CORRESPONDING PARAGRAPHS OF STATE AND FEDERAL COMPLAINT

State Complaint	Federal Complaint
12. For a substantial period of time prior to November 30, 1978, "First Alabama" loaned "Industries" a considerable amount of money for operating and other purposes in its business. "Industries" in turn executed security agreements to "First Alabama" on certain personal property and assets over the life in connection with said loans. At no time prior to November 30, 1978, did "Industries" refuse to pay or fail to pay any of its indebtedness to "First Alabama." During the life of said loans "First Alabama," acting by and through its agents, servants, or employees, including "Herbert," advised and consulted with "Industries" in its business operation and management. "Herbert" personally took over the handling of said loans on a date prior to November 30 in the year 1978 due to the fact that the employee of the bank handling the loans left the employ-	12. For a substantial period of time prior to November 30, 1978, Defendant loaned Subsidiary a considerable amount of money for operating and other purposes in its business. Subsidiary, in turn, executed security agreements to Defendant on certain personal property and assets over the life in connection with said loans. At no time prior to November 30, 1978, did Subsidiary refuse to pay, or fail to pay, any of its indebtedness to Defendant. During the life of said loans, Defendant, acting by and through its agents, servants, or employees, advised and consulted with Subsidiary in its business operation and management. A Senior Vice President, Edward Herbert, personally took over the handling of said loans on a date prior to November 30, 1978, due to the fact that the employee of the bank handling the loans left the employment of Defendant. Subsequent to said date, Mr.

State Complaint	Federal Complaint
ment of "First Alabama." Subsequent to said date, "Herbert" advised and counselled with "Parsons" concerning the operation and management of "Industries."	Herbert advised and cousellled with Subsidiary concerning the operation and management of Subsidiary.
14. On a later date and prior to November 30, 1978, "Herbert" again approached "Parsons" with a request that he enter into negotiations with another prospective purchaser, namely, "Orange." Shortly thereafter "Orange" came to "Industries' " location and looked over the operation. "Orange" later indicated to "Parsons" that he was not interested in purchasing the business, but planned to take over the management of "Industries" at the request and under the direction of "First Alabama" and "Herbert."	13. On a date prior to November 30, 1978, Defendant acting by and through its officer, agent, and employee, Herbert, approached Subsidiary with a request that negotiations be undertaken by Subsidiary with a prospective purchaser, namely Michael Orange. Shortly thereafter, Mr. Orange came to Subsidiary's business location and looked over the operation. Mr. Orange later indicated to Subsidiary that he was not interested in purchasing the business, but planned to take over the management of the company at the request and under the direction of Defendant.
13. Subsequent to the events alleged in paragraph 14, a local attorney, namely Samuel Kaufman, at the direction of "Herbert" and "Orange" was employed to represent "Industries" to bring about a proposed composition of creditors.	14. Subsequent to the events alleged in paragraph 13 above, a local attorney, namely Samuel Kaufman, at the direction of Defendant and Mr. Orange, was employed to represent Subsidiary to bring about a proposed composition

State Complaint	Federal Complaint
"Herbert" instructed "Parsons" to secure a certified audit of the assets and liabilities of "Industries" for distribution to all creditors of "Industries." "Parsons" then employed Vilas V. Vawtar and Associates, P.C., Certified Public Accountants, to comply with "Herbert's" instructions. The work was completed by the accounting firm during the period November 27-28, 1978, and the information made available to the bookkeeper regularly employed by "Industries." A balance sheet on "Industries" was subsequently prepared as of November 30, 1978, by said bookkeeper, using the information supplied by the accounting firm and transmitted to "Orange." This balance sheet showed, as of November 30, 1978, total assets of $2,384,945.89 with total liabilities of $1,910,747.09. "Orange" and "Herbert" refused to use this information and instead supplied information to Kaufman reducing the total assets of "Industries" from $2,384,945.89 to $1,034,000.00	of creditors. Defendant instructed Subsidiary to secure a certified audit of the assets and liabilities of the company for distribution to all of its creditors. Subsidiary had employed Vilas V. Vawtar and Associates, P.C., Certified Public Accountants, to comply with Defendant's instructions. The work was completed by the accounting firm during the period November 27-28, 1978, and the information made available to the bookkeeper regularly employed by Subsidiary. A balance sheet on Subsidiary was subsequently prepared as of November 30, 1978, by said bookkeeper, using the information supplied by the accounting firm and transmitted to Mr. Orange. This balance sheet showed, as of November 30, 1978, total assets of $2,384,945.89 with total liabilities of $1,910,747.09. Mr. Orange and Mr. Herbert refused to use this information and instead supplied information to Attorney Kaufman reducing the total assets of Subsidiary from $2,384,945.89 to $1,034,000.00

State Complaint	Federal Complaint
16. On or about December 14, 1978, "Orange" became Chief Executive Officer of "Industries" on the direct insistance of "First Alabama" and "Herbert." At said time, at the request of "Herbert," "Parsons" resigned as President of "Industries."	15. On or about December 14, 1978, Mr. Orange became Chief Executive Officer of Subsidiary on the direct insistance of Defendant, as a condition of Defendant's renewing Subsidiary's loans and extending operating loans, letters of credit, etc., in the future. At the request of Defendant, Jim D. Parsons resigned as President of Subsidiary as a further condition of credit by Defendant.
17. There was no significant change in the assets or inventory maintained by "Industries," nor in the liabilities of said company from November 27, 1978 to January 17, 1979.	16. There was not significant change in the assets or inventory maintained by Subsidiary nor in the liabilities of said company from November 27, 1978 to January 17, 1979.
18. Attorney Kaufman, at the request of "Orange" and "Herbert," sent a letter to all creditors of "Industries" dated December 21, 1978, which in effect proposed a common law composition of creditors. This proposal was conceived by "Orange" with the overt concurrence of "Herbert." The proposal, mailed to all creditors, listed the assets of "Industries" at	17. Attorney Kaufman, at the request of Mr. Orange and Defendant sent a letter to all creditors of Subsidiary dated December 21, 1978, which in effect proposed a common law composition of creditors. This proposal was conceived by Mr. Orange and Defendant. The proposal, mailed to all creditors, listed the assets of Subsidiary as "approximately $1,034,000.00" with liabilities

State Complaint	Federal Complaint
"approximately $1,034,000.00" with liablities of "approximately $1,948,000.00" and with a negative net worth of "approximately $914,000.00." The proposal stated that it was prepared by the management of "Industries," and stated further that "First Alabama" held a secured position as against all creditors to the extent of $1,200,000.00. The proposal stated further that "First Alabama" had refused to continue to carry "Industries' " loans unless "Industries" brought in new management, and further that "First Alabama" located "Orange" to fill this newly created management role. The proposal stated further that "First Alabama" conditioned restructuring of the existing debt of "Industries" upon acceptance of "Orange" to assume the position of President and Chief Executive Officer of "Industries" and that "Orange" had already assumed the management of "Industries." The proposal stated further that "Parsons" had resigned as President and Chief Executive Officer of	of "approximately $1,948,000.00" and with a negative net worth of "approximately $914,000.00." The proposal stated that it was prepared by the management of Subsidiary, and stated further that Defendant held a secured position as against all creditors to the extent of $1,200,000.00. The proposal stated further that Defendant had refused to continue to carry Subsidiary's loans unless Subsidiary brought in new management, and further that Defendant located Mr. Orange to fill this newly created management role. The proposal stated further that Defendant conditioned restructuring of the existing debt of Subsidiary upon acceptance of Mr. Orange by Subsidiary to assume the position of President and Chief Executive Officer of Subsidiary, and that Mr. Orange had already assumed the management of Subsidiary. The proposal stated further that Jim D. Parsons had resigned as President and Chief Executive Officer of Subsidiary and that Mr.

State Complaint	Federal Complaint
"Industries" and that "Orange" had replaced him, and further, that "Parsons' " salary had been reduced by 50 percent and that he would continue to work with the company as Sales Manager under the direction and control of "Orange."	Orange had replaced him, and further, that Jim D. Parsons' salary had been reduced by 50 percent and that Mr. Orange would have full direction and control over Subsidiary.
19. The above proposal stated that "Industries" had a basically sound organization with buildings, machinery, and equipment in good condition. It stated further that "Industries" could sustain a shipping volume increase from the present $3 million of annual sales to more than $5 million without any significant capital expenditures and the manufacturing and administrative costs were reasonable. It stated further that the "new management" believed the company could show an operating profit for 1979.	18. The above proposal stated that Subsidiary had a basically sound organization with buildings, machinery, and equipment in good condition. It stated further that Subsidiary could sustain a shipping volume increase from the present $3 million of annual sales to more than $5 million without any significant capital expenditures and that manufacturing and administrative costs were reasonable. It stated further that the "new management" believed the company could show an operating profit for 1979.
20. The furnishing of a fraudulent and highly misleading statement of the assets, liabilities, and net worth of "Industries" to its	19. The furnishing of a fraudulent and highly misleading statement of the assets, liabilities, and net worth of Subsidiary to its

State Complaint

creditors, knowing the same to be false and misleading in several respects, portrayed an entirely different picture to the creditors than that which actually existed on November 30, 1978, and on the date of the proposal, viz., December 21, 1978.

21. A relatively small number of the creditors of "Industries" accepted the proposal submitted to them. At no time did "Parsons," or any employee, officer or director of "Industries," with the exception of "Orange," agree to the proposed composition of creditors, nor the approach taken. In fact, "Parsons" repeatedly told "Orange" and "Herbert" that it would not work and would be a financial disaster for "Industries" and that the creditors simply wouldn't buy the proposal. "Orange" and "Herbert" refused to listen to "Parsons" and placed him him in a subordinate position in the operation and management of the company as shown by the Kaufman proposal and the actual day-to-day operations at

Federal Complaint

creditors, by Defendant and Mr. Orange, knowing the same to be false and misleading in several respects. portrayed an entirely different picture to the creditors than that which actually existed on November 30, 1978, and on the date of the proposal, viz., December 21, 1978. A relatively small number of the creditors of Subsidiary accepted the proposal submitted to them. At no time did Parent agree to the proposed composition of creditors, nor the approach taken. In fact, Jim D. Parsons repeatedly told Mr. Orange and Mr. Herbert that it would not work and would be a financial disaster for Subsidiary, and that the creditors simply wouldn't buy the proposal. Mr. Orange and Mr. Herbert placed Jim D. Parsons in a subordinate position in the operation and management of Subsidiary, as shown by the Kaufman proposal and the actual day-to-day operations at the plant site and otherwise. Defendant, acting by and through its officer, agent, and employee Mr. Herbert, because of its posi-

State Complaint	Federal Complaint
the plant site and otherwise. The Defendant "First Alabama," acting by and through its officer, agent, and employee "Herbert," because of its position, exercised almost total control over "Parsons" and "Industries" at this time.	tion of power, exercise total control over Subsidiary at this time.
22. The information supplied by Attorney Kaufman, at the request and under the direction of "Orange" and "Herbert," and subsequently mailed to all creditors of "Industries," was false and misleading in several material and pertinent facts as set out herein. Said proposal substantially mistated the financial condition of "Industries" to the creditors. Defendants "Orange" and "Herbert," individually, and as an officer, agent, or servant of "First Alabama," knew the information suppled to creditors to be false and misleading, and, by their active participation in the preparation and dissemination of same to creditors, knowingly misled said creditors to the actual detriment of the creditors and Plaintiffs.	20. The information supplied by Attorney Kaufman, at the request and under the direction of Mr. Orange and Mr. Herbert, and subsequently mailed to all creditors of Subsidiary, was false and misleading in several material and pertinent facts as set out herein. Said proposal substantially mistated the financial condition of Subsidiary to the creditors. Defendant knew the information supplied to creditors to be false and misleading, and, by its active participation in the preparation and dissemination of same to creditors, knowingly misled said creditors to the actual detriment of the creditors and Plaintiffs.

State Complaint	Federal Complaint
23. On a date in January of 1979, prior to January 9, when it became evident that the creditors would not accept the proposed composition, "Herbert" advised "Parsons" in a private conversation that the Bank would no longer finance the business operations of "Industries," nor would "Industries" be given additional time to secure other financing from other sources. On or about January 9, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that all of the indebtedness of "Industries" would be due and payable on January 15, 1979, and that no additional time would be given to said company. The amount of the total indebtedness owed by "Industries" was stated to be $1,076,486.00 in principal with $33,925.13 interest as of said date.	21. On January 9, 1979, Defendant advised Jim D. Parsons that Defendant would no longer finance the business operations of Subsidiary, nor would Subsidiary be given additional time to secure other financing from other sources. On or about January 9, 1979, Defendant notified Subsidiary that all of its indebtedness to Defendant, stated as $1,076,486.00 in principal with $33,925.13 interest, would be due and payable on January 15, 1979, and that no additonal time would be given to said company.
24. On or about January 11, 1979, "Orange" notified "Parsons" in writing that he was rescinding their agreement and that his working with "Industries" was not serving any purpose, which in effect gave	22. On or about January 11, 1979, Mr. Orange notified Jim D. Parsons that he (Mr. Orange) would "cancel" his agreement with Subsidiary (his resignation required six months to take effect) and,

State Complaint	Federal Complaint
notice that "Orange" would "cancel" his agreement with "Industries" which required six months to take effect and, thus, resign as Chief Executive Officer at the expiration of the stated time.	thus, resign as Chief Executive Officer.
25. On or about January 15, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that all assets secured under the security agreements were being taken in and that physical possession would be taken by "First Alabama" on said date.	23. On or about January 15, 1979, Defendant notified Subsidiary that all assets secured under the security agreements were being taken in and that physical possession would be taken by Defendant on said date. On or about January 15, 1979, Defendant notified Subsidiary that Defendant would sell all collateral security to satisfy the aforesaid loans at Mr. Herbert's office on January 17, 1979 at 2:00 p.m.
26. On or about January 15, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that "First Alabama" would sell all collateral security to satisfy the aforesaid loans at "Herbert's" office on January 17, 1979, at 2:00 p.m.	
27. On or about January 17, 1979, a private sale of the assets of "Industries" was made by "First Alabama" to "OSI," at 10:00 a.m. (two hours prior to the notice time), which purported to convey all rights and title in and to the	24. On or about January 17, 1979, a private sale of the assets of Subsidiary was made by Defendant to OSI, Inc., at 10:00 a.m. (four hours prior to the notice time), which purported to convey all rights and title in and to the said property

State Complaint	Federal Complaint
said property and assets for a sales price of $907,000.00. A bill of sale was executed and delivered by "First Alabama" to "OSI" on January 17, 1979, at 10:10 a.m., purportedly conveying for the consideration of $907,252.65 certain described personal property of "Industries."	and assets for a sales price of $907,000.00. A bill of sale was executed and delivered by Defendant to OSI, Inc. on January 17, 1979, at 10:10 a.m., purportedly conveying for the consideration of $907,352.65 certain described personal property of Subsidiary.
28. At all material times in 1978, and specifically from November 30, 1978, to January 17, 1979, "Herbert" and "Orange" were working in concert to acquire the business owned and operated by "Industries" in Montgomery County, Alabama for "Orange." The methods by which "Orange" took possession and obtained title to the assets and properties of "Industries" could never have happened as it did without the active participation and assistance of "Herbert," an officer, agent, and employee of "First Alabama."	25. At all material times in 1978, and specifically from November 30, 1978, to January 17, 1979, Mr. Herbert and Mr. Orange were working in concert to acquire the business owned and operated by Subsidiary in Montgomery County, Alabama for Mr. Orange. The methods by which Mr. Orange took possession and obtained title to the assets and properties of Subsidiary could never have happened as it did without the active participation and assistance of Mr. Herbert, a key officer, agent, and employee of Defendant.
29. The relationship between "Herbert" and "First" Alabama" was, at all times pertinent hereto, that of agent	26. The relationship between Mr. Herbert and Defendant was, at all times pertinent hereto, that of agent and prin-

State Complaint	Federal Complaint
and principal; the relationship between "First Alabama" and "Industries" was, at all times pertinent hereto, much more than that of banking institution and regular customer, the exact relationship being one of trust as described herein; the relationship between "Orange" and "Industries" as of December 14, 1978 to the present and certainly at the time of his letter dated January 11, 1979, giving notice of his intended resignation (which required six months to take effect) was that of Chief Executive Officer and employer and/or agent and principal. Both "Herbert" and "Orange" owed certain duties and responsibilities to their respective employers, the stockholders of both "First Alabama" and Industries," and to all parties Plaintiff hereto. Their special relationship with "Industries" provided them with certain valuable confidential and insider-type information that only a person in their respective positions could have obtained concerning the operations of the business of "Industries," its	cipal; the relationship between Defendant and Subsidiary was, at all times pertinent hereto, much more than that of banking institution and regular customer, the exact relationship being one of trust as described herein; the relationship between Mr. Orange and Subsidiary as of December 14, 1978 to the present and certainly at the time of his letter dated January 11, 1979, giving notice of his intended resignation (which required six months to take effect) was that of Chief Executive Officer and employer and or agent and principal. The special relationship of Mr. Herbert and Mr. Orange with Subsidiary provided them with certain valuable confidential and insider-type information that only persons in their respective positions could have obtained concerning the operations of the business of Subsidiary, its assets and liabilities, its customers and contacts, and other information which could later be used to their mutual advantage.

State Complaint	Federal Complaint
assests and liabilities, its customers and contacts, and other information which could later be used to their mutual advantage.	
30. The sale of the assets of "Industries" to "OSI," a corporation newly created in January of 1979, for the sole purpose of obtaining the assets and properties of "Industries," was not handled in a commercially reasonable manner, in that acquisition and sale of a highly complicated and complex manufacturing firm was completely transacted in less than two days with the price paid by "OSI" being substantially less than the market value of the assets and properties purported to be sold. In addition thereto, no given an opportunity to inspect the properties and submit bids. Said sale was not handled in conformity with reasonable commercial practices, nor was the property and assets sold for the fair market value thereof. The letter from "Herbert," on behalf of "First Alabama," dated January 15, 1979, to "Par-	27. The sale of the assets of Subsidiary by Defendant to OSI, Inc., a corporation newly created in January of 1979, for the sole purpose of obtaining the assets and properties of Subsidiary, was not handled in a commercially reasonable manner, in that acquisition and sales of a highly complicated and complex manufacturing firm was completely transacted in less than two days with the price paid by OSI being substantially less than the market value of the assets and properties purported to be sold. In addition thereto, no additional persons or firms, who could have been purchasers, were given an opportunity to inspect the properties and submit bids. Said sale was not handled in conformity with reasonable commercial practices, nor were the property and assets sold for the fair market value thereof.

State Complaint	Federal Complaint
sons" giving notice of the aforesaid private sale actually gave notice of sale to "Standard Steel Building Systems, Inc." and not a sale to "OSI." This notice was given and received by the parties thereto on January 15, 1979. At said date, "Parsons" was required by "Herbert" to sign a letter which had been prepared by "Herbert" (or at his discretion) which was explained by "Herbert" and purported to be a Waiver of Notice.	
31. On or about the 2nd day of January, 1979, and at all times thereafter, "Herbert" put great pressure on "Parsons" to require "Industries" to either (a) pay the indebtedness in full or (b) put "First Alabama" in possession of the assets and properties of "Industries" which would have put "Industries" out of business. At no time prior to said date had "Herbert," nor any other person on behalf of "First Alabama," given any indication that "First Alabama" would discontinue financial arrangements with "In-	28. On or about the 2nd day of January, 1979, and at all material times thereafter, Defendant put great pressure on Subsidiary to require Subsidiary to either (a) pay the indebtedness in full or (b) put Defendant in possession of the assets and properties of Subsidiary which would have put the corporation out of business. At no time prior to said date had Defendant given any indication that it would discontinue financial arrangements with Subsidiary. In fact, Jim D. Parsons had been led to believe that Defendant would renew all of said

State Complaint	Federal Complaint
dustries" and/or "Parsons." In fact, "Parsons" had been led to believe that "First Alabama" would renew all of said loans and continue to finance "Industries" operations.	loans and continue to finance the corporation's operations. Defendant made many unsecured loans to Jim D. Parsons at interest rates as low as 5% just prior to the above takeover.
32. The Defendant "First Alabama," acting by and through its officers, agents, or employees, including "Herbert," the Defendant "Herbert," individually, and as an officer, agent, or employee of "First Alabama," the Defenddant "OSI," acting by and through its officers, agents, or employees, including "Orange," the Defendant "Orange," acting individually and as an officer, agent, or employee of "OSI," actively participated in the scheme described hereinabove to take over the operation of the business affairs of "Industries," including its assets and properties which amounted to collusion between said Defendants to do great damage and economic harm to Plaintiffs and which effectively put "Industries" out of business for all practical purposes.	29. Defendant, acting by and through its officers, agents, or employees, including Mr. Herbert, actively participated in the scheme described hereinabove to take over the operation of the business affairs of Subsidiary including its assets and properties which amounted to collusion between said Defendant and others, including Mr. Orange, to do great damage and economic harm to Plaintiffs and which effectively put Subsidiary out of business.

State Complaint	Federal Complaint
36. Subsequently, "First Alabama," acting by and through "Herbert," took possession of the ongoing business operations of "Industries," as set out hereinabove, taking and selling all assets and properties of said corporation.	32. Subsequently, Defendant took possession of the ongoing business operations of Subsidiary as set out hereinabove, taking and selling all assets and properties of said corporation on January 17, 1979, at a private sale to OSI, Inc., a newly formed corporation

Excerpts From Relief Sought:

State	Federal
38. As a direct and proximate result and consequence of the acts of the Defendants described hereinabove, the Plaintiffs, separately and severally, suffered and sustained the following damages:	40. As a direct and proximate result and consequence of the acts of the Defendant described hereinabove, which violated Title 12, U.S.C.A. §1971, et seq., the Plaintiffs, separately and severally, suffered and sustained the following damages:
a. Plaintiffs, individually and separetely, sustained great damage to their general reputation in the business community, which prior thereto had been good.	a. Plaintiffs, individually and separately, sustained great damage to their general reputation in the business community, which prior thereto had been good.
b. Plaintiffs "Industries" and "Steel" sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February	b. Plaintiff, Parent, sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for

State Complaint

which has expired, and they will suffer such losses in the future.

c. Plaintiff "Industries" sustained the loss of all of its assets and properties taken and now claimed by "First Alabama" and/or "OSI" in the value of $2,419,945.89.

d. Plaintiff "Steel" sustained a severe loss due to the serious decline in its own sales and collections due to the problems associated with the aforesaid takeover of "Industries" by defendants.

e. Plaintiff "Steel," as a result of defendants acts and actions, has been greatly damaged in the day-to-day operation of its own business in that it has received a great deal of bad publicity, has lost business and sales, has failed to receive payments when due from its customers on accounts receivable, was forced to pay over to defendant "First Alabama" as a result of its personal guarantee real property with an appraised market value in excess of

Federal Complaint

that portion of the month of February which has expired, and they will suffer such losses in the future: the value of its stock in Subsidiary was rendered worthless and of no value (Subsidiary had assets and properties valued at approximately $2,419,945.89. as of January 17, 1979).

c. Plaintiff, Parent, has been greatly damaged in the day-to-day operation of its own business in that it has received a great deal of bad publicity, has lost business and sales, has failed to receive payments when due from its customers on account receivable; and, it was forced to pay over to Defendant as a result of its personal guarantee real property with an appraised market value of $1,003,000.00, losing title to the real estate as described hereinabove.

d. Plaintiff Jim D. Parsons, lost a good job, has been caused great worry, stress, mental anguish, and has been harrassed by Defendant since the 11th day of January, 1979, all to his

State Complaint	Federal Complaint
$950,000.00 losing title to the real estate as described hereinabove.	great damage and detriment.
f. Plaintiff "Parsons," has been caused great worry, stress, mental anguish, and has been harrassed by defendants since the 11th day of January, 1979, all to his great damage and detriment.	e. Plaintiff Melba E. Parsons has been caused great worry, stress, mental anguish, physical problems caused by worry, tension, and stress, and has been harrassed by Defendant since the 11th day of January, 1979, her stock in Parent has greatly diminished in value, all to her great damage and detriment.
g. Plaintiff "Mrs. Parsons" has been caused great worry, stress, mental anguish, physical problems caused by worry, tension, and stress, and has been harrassed by defendants since the 11th day of January, 1979, all to her great damage and detriment.	f. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.
h. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.	

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 83-V-181-N

First Alabama Bank of Montgomery, N.A.; et al,
Plaintiffs,

vs.

Parsons Steel, Inc.; et al,
Defendants.

OPINION

This cause is submitted on the pleadings and evidence before the Court for an injunction against prosecution of a judgment and proceeding in the Courts of the State of Alabama on the bases of res judicata and collateral estoppel. Plaintiffs, First Alabama Bank and its Vice-President Edward Herbert, insist that this Court has heretofore found in favor of Plaintiff Bank [Defendant in an earlier suit in this Court, *Parsons Steel, Inc., et al v. First Alabama Bank of Montgomery, N.A.*, 679 F.2d 242 (11th Cir. 1982)] based on substantially the same factual allegations and that some Defendants herein [Plaintiffs in the prior suit in this Court and in the current State Court suit] sought to split their causes of action and sue in the federal court for violation of the Bank Holding Company Act [12 U.S.C. §§ 1971, *et seq.*] and in the State court for common law fraud and commercial unreasonableness. The federal court action proceeded to the earlier judgment, the same being in favor of Defendant Bank, and the State court action resulted in a judgment for the assorted Plaintiffs for $4,000,001.00 against the Defendants. The State court action is now pending before State appellate courts. The Plaintiffs insist that this Court, pursuant

to 28 U.S.C. § 2283, has jurisdiction and should exercise the same to protect or effectuate their judgment. The Defendants insist that 28 U.S.C. § 2283 proscribes this suit.

Authorities are well documented that identical parties may not relitigate identical issues in separate courts. A very large part of the costs of litigation is on the public, and the courts, as well as the public, are interested in avoiding multiplicity of litigation under the doctrine of res judicata and other principles of law. This does not mean that every cause of action in existence between parties must necessarily be litigated at the same time. See, *Bragg v. Jim Skinner Ford,* 17 A.B.R. 1412, indicating that purchaser of a car might sue in separate lawsuits for failure to disclose financing terms under the Truth-in-Lending Act, 15 U.S.C. § 1631, and later sue for breach of warranties on the sale of the automobile. However, as pointed out by the United States Court of Appeals for the Fifth Circuit in *Meridian Investing & Dev. Corp. v. Sunco Highland Corp.,* 628 F.2d 370, 372, a federal district court "may not abdicate its authority or duty in favor of State jurisdiction," even though federal courts are most reluctant to encroach on State court jurisdiction. See, also, *Ermentrout v. Commonwealth Oil Co.,* 220 F.2d 527, 530 (5th Cir. 1955). In short, it is clear that the same causes of action may not be litigated a second time between the same parties after final judgment on one or the other proceedings.

A slightly different question arises in a situation where different causes of action arising from the same factual circumstances are alleged in a second suit. The United States Court of Appeals for the Fifth Circuit seems to clearly answer this proposition in *Woods Exploration & Tro. co. v. Aluminum Co. of America,* 438 F.2d 1286, 1315 (5th Cir. 1971), cert.den. 404 U.S. 1047 (1972):

> "The principle of res judicata, enforceable by injunction, would thus preclude relitigation in the state following this

> federal judgment if the state and federal courts involve substantially the same wrongs measured by similar standards of liability so that recovery in the federal suit will have compensated plaintiffs for the total harm suffered ***. Alternatively, even if different standards of recovery existed in the state and federal actions, res judicata would be applicable if plaintiffs were afforded an opportunity to allege the state grounds which constituted the same cause of action in the federal proceedings ***. Focusing on the latter test, we think that the doctrine of pendent jurisdiction *** afforded plaintiffs opportunity for joinder."

As articulated in *Harper Plastics v. Amoco Chemical Corp.*, 657 F.2d 939, 945 (7th Cir. 1981), "res judicata operates to prevent the splitting of a single cause of action and the use of several grounds of recovery under the same action as the basis for separate suits." See, also, *Baltimore S. S. Co. v. Phillips*, 274 U.S. 316, 320 (1926), recognizing that there must be an end to litigation. Plaintiffs in the original suit in this Court sued under the Bank Holding Company Act and proceeded to attempt to show that the Bank, by promising unlimited credit, induced the various Parsons entities to overextend their credit; that the Bank on threat of denying further credit forced Parsons Montgomery to employ Orange as manager; and that, thereafter, the Bank foreclosed its mortgage on Parsons' property and sold for commercially unreasonable prices.[1] The promise to finance, offered as evidence of the preamble to the alleg-

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[1] Plaintiffs' objective was to show that the Bank required unusual services or actions of the creditor as a condition of making a loan, all being in violation of the Bank Holding Company Act. Plaintiffs insisted that the unusual services required were that Mr. Orange, a former customer of the Bank, be employed as manager of Parsons Montgomery and that he be given a right to buy controlling ownership of the corporation. This Court, and ultimately the Court of Appeals for the Eleventh Circuit, concluded that the Bank had not required any unusual banking practice, and judgment was entered for the Bank.

ed Bank Holding Company Act violation in federal court, is alleged as a fraud in the State court. The mortgage foreclosure sale for commercially unreasonable prices appeared in the federal case as evidence of damages and in the State case as a violation of CODE OF ALABAMA, §§ 7-9-504, 7-9-507. Section 7-9-504 provides that every aspect of disposition of security for a loan upon foreclosure "must be commercially reasonable", and § 7-9-507 provides a cause of action "*** to recover from the secured party any loss caused by a failure to comply with ***" § 7-9-504. Evidence of the participation of Herbert, Orange and O.S.I., Inc., was offered in the federal trial as tending to show a conspiracy by the Bank with those parties to take advantage of the Parsons. This conspiracy could and should have been pleaded in the federal proceeding by the Plaintiffs.

Paragraph 40 of the federal complaint and Paragraph 38 of the State complaint indicate that damages claimed to have been caused by the alleged wrongs in each suit are substantially the same. It would, therefore, appear that, in the words of *Woods,* supra, "recovery in the federal suit [would] have compensated plaintiffs for the total harm suffered," and "plaintiffs were afforded an opportunity to allege the state grounds which constituted the same cause of action in the federal proceedings." As shown in *United Mine Workers v. Gibbs,* 383 U.S. 715, a federal court has power to hear State claims if it has subject matter jurisdiction of the federal claim and if the State claims arise from "a common nucleus of supportive fact" so that plaintiff would ordinarily be expected to try them in one proceeding. The doctrine of pendent jurisdiction afforded Parsons an opportunity for that joinder. Instead, they chose to split the alleged srongs with the apparent scheme of relitigating the matter in the event of an adverse decision in the first court.

The United States Court of Appeals for the Fifth Circuit, as recently as April 1, 1983, set out the law applicable also to this Circuit, absent showing to the contrary, in the case of *Nilsen v. The City of Moss Point, Miss.,* 701 F.2d 556, at 560, as follows:

> "And it is equally settled that one who has choice of more than one remedy for a given wrong, *** may not assert them serially, in successive actions, but must advance all at once on pain of bar."

In *Nilsen* the plaintiff had filed suit under 42 U.S.C. § 1983 to recover in a sex discrimination suit for which relief had already been denied her in a suit claiming a parallel remedy under the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq*. Relief under § 2000e had been denied the plaintiff because suit under that section was barred by the statute of limitations. The Court reasoned that the decision was on the merits and that the plaintiff was barred from proceeding in the second suit because of her unexplained dilatoriness in not pleading in the same proceeding all causes of action arising from the same set of facts.

Mr. and Mrs. Parsons and Parsons Steel, Inc., were parties to the federal proceeding against the Bank. The complaint was that the Bank acted through its Vice-President, Edward Herbert. Herbert was in privity with the Bank, and his wrong, if any, should have been charged in the federal court proceeding. It, therefore, appears that the Plaintiffs in the federal suit - Mr. and Mrs. Parsons and Parsons Steel, Inc. - should have been barred from maintaining the suit in the Circuit Court of Montgomery County, Alabama, upon issuance of the judgment of this Court in the suit filed by them against the First Alabama Bank and Mr. Herbert.

However, a fourth plaintiff, A. Pope Gordon, Trustee of the Bankrupt Corporation Parsons Steel Industries (Parsons Montgomery), was not a party to the federal court proceedings and may not be barred by the doctrine of res judicata unless Mr. Gordon, as Trustee, was privy to the parties in the original proceeding. This Court notes from depositions in the file of this Court, of which this Court may take judicial knowledge, that Trustee Gordon was represented by attorneys who participated in the taking of depositions which contained stipulations that the depositions could be used in both the State and federal

cases. See the deposition of Hon. Luther H. Waller, Jr., taken on January 28, 1980. Mr. Waller's deposition shows that the attorney for Trustee Gordon actually participated in the deposition, and Trustee Gordon could hardly argue that he did not have notice of the federal court proceeding under such circumstances. The United States Court of Appeals for the Seventh Circuit, in discussing the inter-relationship between 28 U.S.C. § 2283 (the Anti-Injunction Act), the doctrine of res judicata and the doctrine of collateral estoppel, makes the following statement:

> "The 'effectuate its judgments' exception was added in 1948 to permit a federal court to enjoin relitigation in a state court of a matter determined by a judgment of the federal court, thus abrogating *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100 (1941). 28 U.S.C.A. § 2283, Revisor's Note; 1A, Part 2 J. Moore, *Federal Practice* ¶ 0.208[2]-[3] (2d ed. 1974); *Doe v. Ceci,* 517 F.2d 1203, 1207 (7th Cir. 1975). As Justice Reed said in his *Toucey* dissent, the alternative to allowing such injunctions "is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of *res judicata* which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication.' 314 U.S. at 144, 62 S.Ct. 149.
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> "The relitigation exception of § 2283 applies not only when the prior federal judgment is *res judicata* but also when the doctrine of collateral estoppel, or issue preclusion, is relied upon. *International Association of Machinists v. Nix,* 512 F.2d 125, 132 (5th Cir. 1975). We have even applied it to preclude an ancillary claim that could have been, but was not, asserted in the federal action, *Lee v. Terminal Transport Co.*, 282 F.2d 805, 807

(7th Cir. 1960), *cert. denied,* 365 U.S. 828, 81 S.Ct. 713, 5 L.Ed.2d 705 (1961), ***." *Samuel C. Ennis & Co. v. Woodmar Realty Co.,* 542 F.2d 45, 49 (7th Cir. 1976).

The *Ennis* case overruled the denial of an injunction by a district judge. The Appellate Court held that a trustee in bankruptcy and various other participants in a bankruptcy proceeding were entitled to federal injunctive relief against State action to preclude relitigation of issues decided in their favor by the Bankruptcy Court, as were individuals who, though not parties to the bankruptcy, were either attorneys for parties or did business with the bankrupt estate by buying real estate or arranging sales, as such parties were entitled to assert collateral estoppel, or issue preclusion, as to issues sought to be relitigated in the State action.

> "[T]he bankrupt, Woodmar Realty Company, an appellee here, was represented by Attorney Owen W. Crumpacker, the other appellee here. More than five years after the termination of the proceeding (in bankruptcy), Woodmar, represented by the same attorney, filed a damage suit in an Indiana state court charging the trustee in bankruptcy and various other participants in the bankruptcy court. The defendants in that action, after first moving to dismiss it, filed this federal action against appellees seeking to enjoin the state action. The District Court dismissed this action on the ground that 28 U.S.C. § 2283 forbids the relief sought." (parenthetical expression added). *Ennis,* supra, at 46-47. The Court of Appeals reversed the District Court.

Ennis incidentally rejected the principle of waiver or estoppel of the right to assert the defense of res judicata because of a delay of one year in asserting the same after bringing of the State Court action under circumstances similar to these. In *Ultracashmere House, Ltd. v. Meyer,* 664 F.2d 1176 (1981), a case heavily relied upon by the Parsons to defeat an injunction,

the Court of Appeals affirmed Judge Hobbs' denial of a stay of State Court proceedings, 88 F.R.D. 359. That case accurately states the law[2] pertinent to this type of case, but the facts and the result vary considerably from this case. The District Court recognized that the nonresident (1) had a right, and declined, to remove the litigation to federal court when it was first filed, (2) disregarded the trial court's order, and (3) suffered adverse determination of all issues except the amount of damages before seeking a haven in federal court. Here, the Parsons suffered a federal court judgment before the State court trial. The Defendant in that State court, having by-passed federal removal but having found State court distasteful, sought by injunction to obtain the effective removal so as to relitigate the liability found against it in the State court. To have allowed such relief to Plaintiffs in that case would, in effect, have defeated the purpose of the doctrine of res judicata and would have encouraged every non-resident to sample the climate of State litigation before deciding whether or not to seek a federal hearing. The trial judge assumed, arguendo, that he had discretion to grant the stay but declined to exercise the discretion to relitigate issues decided in the State court. In the instant case, the State court failed to show the same comity to this Court.

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[2] "Where a federal court is asked to interfere with pending state court proceedings, it must proceed with caution, taking into account general considerations of federalism and, in particular, likelihood of seriously disrupting the legitimate functioning of the judicial system of state." *Ultracashmere House, Ltd. v. Meyer,* 664 F.2d 1176, 1177.

"*** res judicata precludes relitigation of an action where four 'essential elements' are satisfied: (1) a prior judgment has been rendered by a court of competent jurisdiction; (2) there is substantial identity of the parties in the two suits; (3) there is identity of issues in the two suits; and (4) the prior judgment was rendered on the merits. *Ozley v. Guthrie,* 372 So.2d 860, 861 (Ala. 1979) (citing *Wheeler v. First Alabama Bank of Birmingham,* 364 So.2d 1190 (Ala. 1978)). 'Where these elements are present ... the former judgment is an absolute bar to any subsequent suit on the same cause of action, including any issue which was or could have been litigated in the prior action.' *Ozley,* supra, at 861 (citing *McGruder v. B & L Construction Co.,* 331 So.2d 257 (Ala. 1976)).***." *Ultracashmere,* supra, at 1183-84.

An argument by another trustee in bankruptcy, that he was not a party to a federal action and, therefore, should not be barred from bringing a State court action by the principles of res judicata and collateral estoppel, was rejected by a bankruptcy court. *In re Four Corners Enterprises,* 17 B.R. 156 (M.D. Tenn. 1982). In *Four Corners,* creditors and former majority shareholders of the debtor corporation to recover on a promissory note. The defense in the federal court was that the note was an obligation of the corporation only and not of the sole shareholder thereof. The plaintiffs in *Four Corners* countered by contending that the stockholder was personally liable because he had operated the corporation as its alter ego. The court found against the plaintiffs and dismissed the case. Subsequently, the trustee of the debtor corporation brought an action against the sole stock holder to charge him personally liable for the corporate debts. The court held that this attempt at religitation was barred under the doctrine of collateral estoppel, by the prior litigation of the former stockholders of the debtor corporation, stating the following:

> "The trustee was well aware of these proceedings (the prior federal action) and made no effort to intervene as an interested party. The trustee's inaction inveighs against now allowing him to relitigate the same issue previously decided in the federal district court proceeding. [citations omitted] Furthermore, the trustee has employed as attorney to pursue this action the same attorney who represented the Fields in their suit against the defendant in federal district court. Under these circumstances, the trustee cannot complain that he lacked a full and fair opportunity to litigate the issue in question at the federal district court proceeding. Collateral estoppel thus precludes the trustee from relitigating this issue." *Four Corners,* supra, at 160. (parenthetical expression added).

The relative positions of the trustee and the bankrupt are discussed in *Paradise v. Vogtlandische Maschinen-Fabrik,* 99 F.2d 53, 55 (3rd Cir. 1938), wherein the court said:

> "It is settled that a pending action will not abate merely because of the bankruptcy of the plaintiff. [citations omitted] In such a case the trustees in bankruptcy may either assume prosecution of the action with the court's approval, consent to its continued prosecution by the bankrupt for their benefit, or decline to prosecute it because it is likely to involve them in fruitless expense. [citations omitted] Furthermore if the suit is thus continued by the bankrupt the trustees will be concluded by the judgment. [citation omitted]."

A trustee in bankruptcy would also be precluded from relitigation by a judgment in a case wherein he should and could have been made a party to assert the trustee's rights but elected not to do so.

Parsons rely, for their contention that the Trustee could not have intervened in the federal proceeding, upon *Blake v. Pullen,* 554 F.2d 947, to the effect that permissive intervention under Rule 24 must be supported by independent jurisdictional grounds. The damages sought by Parsons against the Bank in the federal court specifically involved damages allegedly done to Mr. and Mrs. Parsons and their almost wholly-owned corporation (Parsons Mobile) allegedly as a proximate result of dealing between the Bank, acting through its Vice-President Herbert, and its debtor, Parsons Montgomery, acting through Mr. Parsons and, to some extent, Mrs. Parsons, who pledged some of the property of Parsons Mobile for security. Viewing the barebone, though complicated, pleadings in retrospect, this Court is now firmly of the opinion that Parsons Montgomery (more properly its Trustee in Bankruptcy) was the primary, if not sole, party damaged by the alleged violation of the Bank Holding Company Act. Parsons Mobile was primarily damaged by damage to its wholly-owned subsidiary, and Mr. and Mrs. Parsons, as controlling stockholders in Parsons Mobile, were damaged largely because of the bankruptcy of the subsidiary, Parsons Montgomery. This Court is firmly of the opinion that

any right of the creditors of Parsons Montgomery could have been asserted in the federal proceeding. The Trustee had the option to join in that suit or to await a judgment, if any, and assert the creditors' rights against the stockholders of the bankrupt corporation if they had been successful in the federal action. The Trustee, viewing both the federal and the State proceedings as a waste of effort, declined to join or did not consider joining in either. The Trustee was joined in the State court proceeding involuntarily on motion of the Bank. While the jury disagreed, the wisdom of the Trustee's reluctance to expend the creditors' money in processing these two complaints is understandable to this Court. Once the defects of the Bank Holding Company Act claim, obscured by barebone pleadings were clarified by the evidence, the failure of the federal claim was assured, even though the claim was vaguely substantial enough to give federal jurisdiction of State claims arising from the common nucleus of supporting facts. The decision not to subject the creditors to the expense of prosecuting the State claims arose from reasonable concerns: (1) the fraud claim arose from Parsons' claim that the Bank fraudulently promised him unlimited credit - one who has dealt with banks would doubt that a jury would believe that unlimited credit would be promised to anyone by any reputable banker; (2) the claim for sale of secured property at a commercially unreasonable price was hardly an enviable plaintiff's case when Parsons admitted the debt and had an opportunity to secure a better sales price; and (3) the claims for violation of fiduciary relationships, when both the Bank and Orange appeared to operate at arms-length in business relationships with the Parsons' entities in situations where everyone hoped to prosper, hardly appeared to offer great hope. This Court is of the opinion that the Trustee had reasonable cause to be unimpressed with the Parsons' chances of success.

This Court is of the opinion (1) that the State Circuit Court, in trying an identical set of facts to those previously tried in this Court, has disregarded, and is disregarding, the final judgment

of this Court over timely filed defenses of res judicata and collateral estoppel; (2) that, when those defenses were filed, the complicated pleadings obscured the similarity of proceeding and privy of parties from a State trial court unfamiliar with the prior litigation in this Court; and (3) that to allow a continuation of the State court proceedings in another State court would simply complicate the wrong. The public itself, as well as the parties, is interested in deterring relitigation of suits and no individual may waive the public interest. The Bank's reasons for relitigating in the State court before seeking relief from this Court can only be imagined, but Defendants did everything possible in the State court to demonstrate applicability of the doctrines of res judicata and collateral estoppel before returning to this Court. The pleadings were complicated, and the claims of the Plaintiffs were vague. This Court, having considered the same transactions, can understand the problem of proving without a trial those defenses to a court unfamiliar with the federal case. This Court is, therefore, of the opinion that neither waiver nor estoppel will bar Plaintiffs' bringing this suit to bar further relitigation of proceedings already decided in this Court.

Judgment with costs will be entered for the Plaintiffs, and the Defendants will be enjoined from further prosecution of the case entitled *Parsons Steel Industries, Inc., et al v. First Alabama Bank of Montgomery, N.A., et al,* Civil Action No. CV-79-179-G, in the Circuit Court of Montgomery County, Alabama.

DONE this 15th day of June, 1983.

United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 83V-181-N

First Alabama Bank of Montgomery, N.A., et al.,
Plaintiffs,

vs.

Parsons Steel, Inc., et al.,
Defendants.

ORDER

(Filed March 29, 1985)

In accordance with the Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that the injunction heretofore issued by this Court in this cause should not be modified to allow the Trustee to pursue his UCC claim.

DONE this 29th day of March, 1985.

/s/ R.E. Varner
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 83V-181-N

First Alabama Bank of Montgomery, N.A., et al.,
Plaintiffs,

vs.

Parsons Steel, Inc., et al.,
Defendants.

OPINION

(Filed March 29, 1985)

The history of this case is well stated by the Court of Appeals in *Parsons Steel, Inc. v. First Alabama Bank of Montgomery,* 679 F.2d 242, [Parsons I], and in *First Alabama Bank v. Parsons Steel, Inc.,* 747 F.2d 1367 (11th Cir. 1984) [Parsons II]. The Court of Appeals in Parsons II remanded with instructions that this Court make fact-findings to determine whether the injunction should be modified to allow the Trustee to pursue his UCC claim based only on the actual foreclosure sale. That Court pointed out in guidance:

> "Assuming that the Trustee's UCC claim is based on factual allegations different from those underlying the fraud and BHCA claims, the parties' interests were not so closely aligned to say the Parsons virtually represented the Trustee as to this narrow claim that the Parsons did not raise in the federal action."

In response to the remand for clarification of the commercial unreasonableness claim, this Court ordered Trustee to specifically set out said claim. That claim will be considered and compared to the Parsons I claim hereinafter.

The Court of Appeals stated in Parsons II that, almost a year after this Court's judgment [referring to Parson I] in the

Bank's favor, "the Trustee amended his [State] complaint to include the UCC claim that the foreclosure sale was commercially unreasonable. Until that point in the litigation, the state action against the Bank was based on the factual allegations which had been fully adjudicated in the BHCA action. With the addition of the UCC claim, however, the state action began to involve fact questions which the district court found were part of the federal complaint, but which were not reached in the federal litigation" [Parsons II at 1379-1380]. The Court of Appeals held that the record on appeal was insufficient, however, to determine whether the UCC claim is based on the same factual allegations as was the fraud and the BHCA claims. As noted by the Court of Appeals [Parsons II, at p. 1379], the UCC claim in Parson II is based on commercial unreasonableness. Paragraph 27 of the complaint in Parsons I federal case concerned commercial unreasonableness.[1] This Court found against the Plaintiff on all aspects. Responsibility is on appellant to have a record showing the error. Nonetheless, the Appellate Court, in its remand, states the following:

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[1] Said Paragraph 27 of the Parsons I complaint contained this allegation: "The sale *** was not handled in a commercially reasonable manner ***." The pleaded reasons therefore related to the same facts from which the BHCA violation and the fraud allegations allegedly arose as stated in the complaint. Loose pleading requirements allowed Plaintiffs to state in a one-count or one-claim complaint allegations of a BHCA violation [Paragraph 34], a conspiracy [Paragraphs 25 and 29], a trust violation [Paragraph 26], a commercially unreasonable sale [Paragraph 27], lack of good faith, CODE OF ALABAMA [1975], § 7-1-201, and fraud [Paragraph 30]. It is difficult for this Court to understand the conclusion in the dissent, Parsons II, at p. 1382, as follows: "[A]s the majority correctly notes, the commerical reasonableness claims - the factual basis for which is unclear on the present record - were not pleaded at all in the federal action." The Trustee's attorney had access to these pleadings and participated in discovery. He was clearly privy to the commercial reasonableness claims. If they were treated as damages, he had every opportunity to have prayed that they be treated as a separate cause of action.

> "If the UCC claim merely alleges that improprieties involving the Bank and Michael Orange prior to the sale resulted in the receipt of an unfairly low price for the company's assets, then the district court was correct in finding privity and barring the Trustee from asserting the UCC claim in state court." Parsons II, supra, at 1380.

CURRENT UCC CLAIM. Whether or not the UCC claim alleges only that "improprieties involving the Bank and Michael Orange prior to the sale resulted in the receipt of an unfairly low price for the company's assets" can best be determined by examining the Trustee's Claims filed herein February 21, 1985, in response to this Court's Order entered February 6, 1985, directing that the Trustee state with particularity his UCC claims.

CURRENT CLAIMS OF TRUSTEE. Guided by the Order of the Court of Appeals that res judicata would bar no part of the Trustee's UCC Claims "separate and apart from any of the events leading up to the sale" [Parsons II, supra, at p. 1380], the Trustee's attorney sought to direct his claims to some impropriety occurring after the sale, complaining of a "commercially unreasonalbe sale and wrongful disposition of the assets of Parsons Steel Industries, Inc. *** after a foreclosure in January of 1979," in violation of CODE OF ALABAMA [1975], §§ 7-9-504, 7-9-507 and 7-1-201. Sections 7-9-504 and 7-9-507 deal with a commercially unreasonable sale, and Section 7-1-201 deals with the duty of good faith.[2]

More specifically, the Trustee contends in his response to this Court's Order directing specificity the following: (1) that the sale was a private sale of the securities two days after repossession; (2) that only one potential buyer was notified of the sale; (3) that the buyer had no pre-sale experience in the steel business; (4) that no contact was made with any person in the

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[2] It is noted that Paragraphs 27 and 30 of the complaint in Parsons I contained allegations of a commercially-unreasonable sale and a lack of good faith, respectively.

steel business or with any unsecured creditor; (5) that no notice was given the attorney for Parsons Steel Industries, Inc.; (6) that no notice was placed in any steel interests or public publications; (7) that no one except seller and purchaser were in attendance at the sale; (8) that the sale was at a private place; (9) that only one bid was offered and accepted; (10) that the price paid at the sale was determined in accordance with the amount necessary to satisfy the Bank's secured debt; and, finally, (11) that the sales price was $907,252.85 while the value of the collateral was in excess of $2,500,000.00.

It appears to this Court and this Court finds that each of these items of the current contentions of the Trustee was part of the original claims made in this Court and litigated in the suit by Parsons Steel, Inc., and affirmed by the Court of Appeals in Parsons I, supra.

In Paragraph 14 of the complaint [Parsons I], Plaintiffs alleged that on November 30, 1978, a balance sheet of Parsons Steel Industries, Inc., showed assets of $2,384,945.89 and liabilities of $1,910,747.09. Plaintiffs alleged in Paragraph 16 of the plaint that conditions were substantially the same on January 17, 1979. Paragraph 24 of the complaint contained allegations that on January 17, 1979, a private sale of the assets of Parsons Steel Industries, Inc., was held at 10:00 a.m., rather than at the announced time of 2:00 p.m., to OSI, Inc., for $907,252.85. Paragraph 25 of the complaint contained allegations that the agent of the Bank and Mr. Orange for OSI, Inc., worked in concert so as to obtain properties of Parsons Steel Industries, Inc., for Orange. Paragraph 26 of the complaint contained allegation suggesting a violation of a resulting trust. Paragraph 27 of the complaint contained allegations that the sale was "not handled in a commercially-reasonable manner in that the acquisition and sale were completely transacted in less than two days with the price paid by OSI being substantially less than the market value of the assets purported to be sold;" that no additional possible purchasers were given any opportunity to in-

spect the properties and submit bids; that the sale was not handled in conformity with reasonable commercial practices; and that the assets sold for other than the fair market value thereof. Paragraph 29 of the complaint contained allegations that the Bank, Orange and other were guilty of "collusion *** to do great damage and economic harm to the Plaintiffs and which effectively put ***" Parsons Steel Industries, Inc., out of business. Paragraph 30 of the complaint contained allegations of lack of good faith and fraud with intent to deceive and injure the Plaintiffs and the creditors of Parsons Steel Industries, Inc. Paragraph 32 of the complaint contained allegations of the January 17, 1979, private sale to OSI, Inc., a newly formed corporation, resulting in Plaintiffs' loss of an on-going business together with its assets, leaving unsecured debtors owed $847,000.00. Paragraph 34 of the complaint contained allegations of a violation of the Bank Holding Company Act. Paragraph 37 of the complaint contained allegations that Parsons Steel Industries, Inc., had been placed in involuntary bankruptcy. The trustee in Bankruptcy and his attorney participated in discovery proceedings in Parsons I and, obviously, had access to the complaint which contained the above allegations when he elected not to pursue any remedy on the Trustee's part or on behalf of the creditors.

Another indication that the State claims relate to alleged presale activity can best be determined by the way that the Trustee's attorney processes them in the State court proceeding. In his opening statement, Mr. Wood adopted Mr. Beasley's statement, saying specifically the unsecured creditors "*** had no notice of any foreclosure sale" and that "the Bank obtained from Michael Orange enough to satisfy the Bank's debt but not any more ***." [R. 61-62]. In his closing argument, Mr. Wood stated, "We are entitled to recover on commercial reasonableness—on fraud and conspiracy." [R. 1573]. Mr. Wood, further referring to the pre-sale failure to obtain purchasers and to determine the value of inventory, said that the

Bank "didn't try to find out. Just figured out what the Bank was owed. Same answers on all the other assets of Parsons Steel." [R. 1573]. Mr. Wood stated that "*** Parsons Steel Montgomery is entitled to recover *** on the commercial reasonableness *** of the sale ***. It was *all pre-arranged.* *** It was done in hidden fashion. *** You've got a corporation that was formed especially for it" (emphasis added). [R. 1575]. Mr. Wood spoke of the Bank's wanting to avoid a Chapter 11 proceeding because it would have been more difficult. He spoke of the fact that the time of the sale was changed from "ten to two" because they did not want anyone else there because they "*** were going to sell to Michael Orange," that "they made that decision way back on the tenth or eleventh." [R. 1576]. Referring to the same pre-sale activity, Mr. Wood stated: "Some how, some way in December, they decided to do it differently." [R. 1578].

Trustee's attorney at the State trial complained (1) of plans made before the sale, (2) of fraudulent plans before the sale, (3) of insufficient notice before the sale, (4) of changing before the sale of the time of the sale, (5) of plans to sell to Orange made before the sale, (6) of plans to sell for the amount owed the Bank before the sale, (7) of avoidance of a Chapter 11 proceeding before the sale, (8) of failure before the sale to determine what the inventory was worth, (9) of failure before the sale to determine what other assets were worth and, finally, (10) of the "pre-arranged" lack of "commercial reasonableness of the sale."

Every word of the Trustee's attorney's statements during the State Court trial was devoted to pre-sale activities of Michael Orange and the Bank's agent Herbert. No suggestion was made that the Defendants in the State court case did anything wrong after the sale. The only substantial change in the Trustee's position is that the Trustee's attorney, guided now by the admonition of the Court of Appeals, alleged, as a preamble to allegations of pre-sale activities, that the Bank "conducted a commer-

cially unreasonable sale and wrongful disposition of the assets of Parsons Steel Industries, Inc., ***" after a foreclosure in January, 1979.

The Court of Appeals stated that, because the questions of liability and damages were bifurcated, evidence of an insufficient price as bearing on commercial reasonableness was never presented to the jury in the federal court trial. The parties to that proceeding and the Trustee had access to the pleadings and participated in a number of the discovery proceedings. They understood that commercial reasonableness of the sale was an issue in the case, whether as damages for the Bank Holding Company Act violation or as an independent claim as now asserted, and the Trustee had every opportunity to litigate commercial reasonableness either as a part of the Bank Holding Company Act or as a part of an independent claim for commercial reasonableness at his option. If the alleged value of the assets as compared to the sales price were not litigated in the trial proceeding in this Court, it was because the parties did not present it to this Court as an issue independent of the Bank Holding Company Act violation. The Trustee knowingly declined to participate. His failure to do so, whether by design (so as to obtain two bites at the apple) or by inadvertence, bars his doing so now under the doctrine of res judicata.

The Trustee's contention that the sales price was unreasonable derives from Plaintiff's claim in Parsons I that the whole thing was planned prior to the sale and that the Bank's agent and Michael Orange, the purchaser, knew and arranged prior to the sale that the sales price would be the amount of the debt to the Bank. Note 11 of the Opinion of the Court of Appeals in Parsons II, supra, at 1373-1374, reads as follows:

> "The record in this appeal does not indicate what precise facts the UCC claim is based on. That is, it is unclear whether the claim is based on allegations that something about the handling of the actual sale was commercially

> unreasonable and resulted in an insufficient price or whether the UCC claim is based solely on allegations that improprieties involving the Bank and Orange prior to the sale resulted in an unfairly low price."

This Court concludes that the Court of Appeals' Opinion means that, if nothing wrongful happened at the time of the actual sale and the improprieties complained of involved allegations of wrongs by the Bank and Orange prior to the sale resulting in an unfairly low price, then Parsons and all those associated with him, including the Trustee, are barred from further pursuit of this proceeding. Clearly, in the mind of the Court the things that the Trustee still argues were wrongful occurred prior to the sale. While the Trustee insists that the sale itself was unreasonable and the disposition of the proceeds was wrong, he alleges no non-conclusory facts which would indicate that any wrong that was done at or after the sale was improper. His claims of impropriety relate to plans made by Herbert and Orange: failure to give public notice of the sale, failure to seek buyers to the sale, failure to hold the sale at the time previously planned and failure to learn the value of the property securing the debt - in short, failure to do those things prior to the sale which allegedly would have produced a fair price for the property sold. All of those matters have been litigated, and the Court of Appeals has affirmed a judgment for the defendant thereon. The Trustee, being in privy with the plaintiffs in that case, is bound by the proceeding.

This Court has been troubled by factors raised in the dissent in Parsons II beginning at 747 F.2d 1367. The dissenter takes the position that, while the original federal adjudication of this proceeding might have initially provided a res judicata bar to the State court proceeding, the determination by the State court that the federal court proceeding was not res judicata of the issues in the State court constituted a res judicata bar to the federal court's considering the matter. The Bank, realizing that the pleadings were not specific and initally having its own

doubts that all of the issues in the State court proceeding were barred by the doctrine of res judicata, found it necessary to proceed in the State court proceeding in order to determine that the issues in the State court proceeding were the same as that already concluded by this Court's judgment. That being true, the doctrine of res judicata could only be applied at such time as the issues in the State court proceeding were clearly identified and could be compared to the issues in Parsons I.

The dissenter argues that the Bank should have sought an injunction before the trial in the State court. In cases such as this where issues are not clear in either court, a special hearing would be required to determine precisely what the issues were in each proceeding. On occasion (and probably in this case) this could not have been fully determined until the trial on the issues. If this Court is to protect its jurisdiction, it must have the authority to do so at the point where invasion of jurisdiction becomes apparent. Piecemeal decisions thereon would be of little value.

This Court is of the opinion that the res judicata issue cannot be determined in some cases until the trial on the merits and that the Defendants in this case, by submitting to a trial on the merits including the plea of res judicata in the State case, cannot be held to a waiver of their rights to submit the res judicata issue to the court first having jurisdiction because the issue of waiver concerns itself with private rights as distinguished from public rights and the doctrine of res judicata has as its purpose the avoidance to the public, as well as the parties, of expenses of unnecessary litigation and the conservancy of judicial efforts. This Court is convinced that no private individual should be allowed in effect to waive the effect thereof.

This Court, therefore, finds that the injunction heretofore issued by this Court should not be modified to allow the Trustee to pursue his UCC claim because that claim is based on matters heretofore litigated by this Court and the Trustee was privy to such litigation.

An Order will be enacted in accordance vith this Opinion.

DONE this 29th day of March, 1985.

/s/ R.E. Varner
United States District Judge